

Original  
RECEIVED

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

SEP 13 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
Siren, WI )

RM-8852

MM Docket No. 96-105

To: Chief, Allocations Branch

DOCKET FILE COPY ORIGINAL

OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY COMMENTS

Harbor Broadcasting, Inc. (HBI), by its attorney, hereby opposes Badger Broadcasting Corporation's (Badger) September 6, 1996 Motion for Leave to File Reply Comments (Motion). In opposition thereto, the following is respectfully submitted:

1) On June 28, 1996 Badger filed a "COUNTERPROPOSAL" in MM Docket 96-105. Counterproposal, p. 3. Badger proposed allotting channel 265A to Siren, WI rather than substituting channel 265A for channel 221A at Pine City, MN as proposed by HBI. In response to Badger's Counterproposal, and during the initial pleading cycle in MM Docket 96-105, HBI proposed an allocation of channel 265A to Pine City, MN and channel 289A to Siren, WI rather than Badger's proposed allocation of channel 265A at Siren, WI. See HBI's July 15, 1996 Reply Comments in Support of Rule Making.<sup>1</sup>

2) By Public Notice issued August 6, 1996 (Report No. 2145) the Commission requested comments on Badger's Counterproposal and

<sup>1</sup> As permitted by the August 6, 1996 Public Notice, Report No. 2145, HBI submitted additional comments in its August 21, 1996 Opposition to Petition for Rule Making (RM-8852). However, the essence of HBI's allocation plan for Siren, WI was disclosed in HBI's July 15, 1996 Reply Comments in Support of Rule Making.

No. of Copies rec'd  
List ABCDE

044

made Badger's Counterproposal a part of MM Docket 96-105. The Commission indicated that comments upon Badger's Counterproposal could be filed by August 21, 1996.<sup>2</sup> In keeping with existing policy, the August 6, 1996 Public Notice did not establish a reply filing deadline vis-a-vis the comments submitted in connection with Badger's Counterproposal.<sup>3</sup>

3) Badger's Motion indicates that Badger "is unrepresented by Counsel and was unaware of the reply comment deadline as it was not contained in the related Public Notice." Badger does not explain how it came to "understand" that there was, in fact, a "reply comment deadline;" Badger does not explain why it could not have uncovered this "fact" earlier; and Badger does not provide any legal citation in support of its purported right to file a reply.

4) In any event, Badger is not entitled to file a reply to the comments filed in response to the August 6, 1996 Public Notice. It is long standing Commission policy that absent an express order of the Commission in complex rule making cases, replies to comments upon a counterproposal are not allowed. Implementation of BC Docket NO. 80-90 to Increase the Availability of FM Broadcast Assignments, Memorandum Opinion and Order, 5 FCC Rcd. 931, 933 n.

---

<sup>2</sup> Badger filed comments in response to the August 6, 1996 Public Notice by the August 21, 1996 deadline.

<sup>3</sup> Badger's Counterproposal was submitted in opposition to HBI's requested allocation of channel 265A at Pine City, MN. Thus, although the August 6, 1996 Public Notice indicates that "comments" on the Counterproposal could be filed, the "comments" which were filed by August 21, 1996 are properly considered "reply" comments to Badger's opposition.

12 (Comm'n 1990).<sup>4</sup> Badger has no right to file a "reply" to HBI's August 21, 1996 comments upon Badger's Counterproposal.

5) The Commission's "no reply" policy is codified at 47 C.F.R. §1.415 which provides for comments and reply comments submitted in conjunction with a notice of proposed rulemaking and which prohibits additional comments in that rulemaking proceeding "unless specifically requested or authorized by the Commission." The Commission's May 7, 1996 Notice of Proposed Rule Making and Order to Show Cause issued in the instant Docket established the pertinent comment and reply dates.

6) The Commission's August 6, 1996 Public Notice, which incorporated Badger's Counterproposal into the instant Docket, authorized only one more round of pleadings in MM Docket 96-105. Because the Public Notice did not authorize Badger's Reply, because the rules do not permit Badger to file a reply, and because Badger has not presented any public interest considerations which warrant a waiver of the "no reply" rule, Badger's Motion must be denied.

7) As a final matter, through HBI's July 15, 1996 Reply Comments in Support of Rule Making, Badger had advance notice of

---

<sup>4</sup> In Implementation of BC Docket 80-90 the Commission found that the highly complex rule making involved therein ("a daisy chain of mutually exclusive proposals") warranted consideration of "pleadings responsive to the pleadings filed during the initial fifteen day period if those pleadings are filed within 30 days after the date of the staff's public notice." At issue instantly is merely one counterproposal and not a complex daisy chain. The instant proceeding is not complex and Badger does not assert otherwise. Moreover, even in complex cases, the Commission requires that a responsive pleading be filed within 30 days of the public notice of the counterproposal. Instantly, Badger's Reply was filed more than thirty days after the Commission's August 6, 1996 Public Notice. Accordingly, Badger's Reply is not authorized and it should not be considered.

HBI's proposal to substitute channel 289A for channel 265A at Siren, WI when Badger filed its August 21, 1996 Comments. Because counterproposals are responsive to petitions for rulemaking, the Commission requires that counterproposals be technically and procedurally correct. Moreover, counterproposals must be substantively complete when filed and a counterproposal cannot be revised after filing. Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 8 FCC Rcd. 4743, 4744 n. 6 (Comm'n 1993).

8) The purpose of Badger's Reply is to attempt to provide additional support for its request for channel 265A at Siren, WI. Badger had opportunities in its Counterproposal and through its August 21, 1996 Comments to raise any issue which it felt warranted Commission attention.<sup>5</sup> Because Badger's Counterproposal, as supplemented by its August 21, 1996 Comments, must be considered substantially complete, and because Commission policy precludes Badger from revising its Counterproposal, Badger's Motion for a third bite at the apple must be denied.

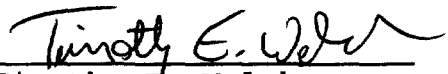
WHEREFORE, in view of the information presented herein, it is respectfully submitted that Badger's Motion be denied either because Badger has not justified a waiver of the "no reply" rule and/or because Badger's Counterproposal and its supporting Comments must stand on their own without additional support.

---

<sup>5</sup> It is important to note that when Badger filed its August 21, 1996 Comments, Badger had prior notice of HBI's proposal to allocate channel 289A to Siren, WI, rather than channel 265A as proposed by Badger, through HBI's July 15, 1996 Reply Comments in Support of Rule Making.

Respectfully submitted,  
HARBOR BROADCASTING, INC.

Hill & Welch  
Suite #113  
1330 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 775-0070  
September 13, 1996

  
Timothy E. Welch

Its Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of September 1996 mailed a copy of the foregoing OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY COMMENTS to the following by First-Class United States mail, postage prepaid:

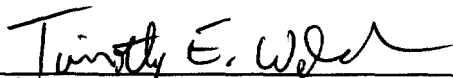
Pine City Broadcasting Company, Inc.  
Station WCMP  
RR Two  
Pine City, MN 55063

David G. O'Neil  
Rini, Coran, Lancellotta, P.C.  
1350 Connecticut Ave., N.W. #900  
Washington, D.C. 20036  
Counsel to Boundary Waters Broadcasters, Inc.

Matthew H. McCormick  
Reddy, Begley & McCormick  
10001 22nd Street, N.W. #350  
Washington, D.C. 20037

Tom W. Davidson, P.C.  
Michael Ray  
Akin, Gump, Strauss, Hauer & Feld, L.L.P.  
1333 New Hampshire Ave., N.W. #400  
Washington, D.C. 20036

Steven T. Moravec, President  
Badger Broadcasting Corporation  
1407 Sumner Street #200  
St. Paul, MN 5516-2645

  
\_\_\_\_\_  
Timothy E. Welch